IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No.

GEORGE SCHWARTZ,

Petitioner,

against

UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

POINT I

At the time it was stolen, the whiskey was no longer moving in foreign commerce and the trial court erred in not directing a verdict of acquittal and in denying petitioner's motion to set aside the verdict.

The Government's own proof, wholly uncontradicted, established that the contract of shipment of the whiskey was terminated and the foreign transportation completed at Pier 1, Hoboken, New Jersey.

Regardless of what may have been the original place of delivery (and we submit that the bill of lading specifies no other place than the steamship company's pier in

Hoboken), once McKesson & Robbins, Inc. paid the Manufacturer's Trust Company for the 1,000 cases and acquired full ownership thereof by having the bill of lading assigned to it, McKesson & Robbins, Inc. had the absolute right to change the contract of shipment and with it the transportation in any way agreeable to it and the steamship carrier.

> "The control over goods in process of transportation, which may be repeatedly changed by sales, is one thing; the transportation is another thing, and follows the contract of shipment, until that is changed by the agreement of owner and carrier".
>
> *Gulf, Col. & Santa Fe R'way. Co.* v. *Texas,* 204 U. S. 403, 412.

The agreement made by McKesson & Robbins, Inc. and the steamship carrier, evidenced by the practice and course of conduct betwen them on this shipment of 1,000 cases of Scotch whiskey and on prior shipments, was that the whiskey should be discharged onto the dock at Pier 1, Hoboken and there delivered to McKesson & Robbins, Inc. after payment of the price and all freight charges. Under this agreement, McKesson & Robbins, Inc. was to enter the whiskey in Customs pending payment of the duties, accept the delivery thereof at Pier 1, Hoboken, load it on to its own bonded trucks there and remove it in said trucks to the bonded warehouse of McKesson & Robbins, Inc. at 111 Eighth Avenue, New York City.

With the freight charges paid, the whiskey entered in the Customs as the property of McKesson & Robbins, Inc. and actually delivered to McKesson & Robbins' authorized representatives, and the bill of lading turned over by McKesson & Robbins, Inc., the steamship carrier had no further interest in or right to interfere with the shipment. Neither had the shipper or any one else. This was so even though the customs duties remained unpaid.

> *In Re Talbot & Poggi,* 185 Fed. 986;
> *Cartwright* v. *Wilmerding,* 24 N. Y. 521.

The reciprocal rights of the shipper, the carrier and the owner came to an end once the contract of shipment was fulfilled, either according to its original terms or according to any change in these terms mutually agreed to by the owner and shipper.

Gulf, Col. & Santa Fe R'way. Co. v. *Texas,* 204 U. S. 403, 412;
Texas & N. O. R'way. Co. v. *Sabine Tram. Co.,* 227 U. S. 111, 126;
Western Union Telegraph Co. v. *Foster,* 247 U. S. 105, 113.

It is true, of course, as this Court has stated in *U. S.* v. *The Erie Railroad Co., et al.,* 280 U. S. 98, that the nature of the shipment is not dependent upon the question when or to whom the title passes, but rather by the essential character of the commerce.

But the essential character of the commerce is determined by the practice and typical course of dealing of the parties evidencing their final agreement.

Chicago M. & St. Paul R'way. Co. v. *Iowa,* 233 U. S. 334;
Western Union Telegraph Co. v. *Foster,* 247 U. S. 105;
Atlantic Coast Line R'way. Co. v. *Standard,* 275 U. S. 257.

Regardless of whether the intention of the shipper and the original consignee of these 1,000 cases of whiskey was to make No. 111 Eighth Avenue, New York City, the destination of the shipment, this intention and the contract of shipment were later changed when McKesson & Robbins, Inc., the assignee of the original assignee, purchased the whiskey in transit, paid the full price and all freight charges thereon, entered the whiskey in Customs

in its own name as owner, surrendered the bill of lading to the shipper, took physical possession of the whiskey and placed it in McKesson & Robbins, Inc's. own bonded truck for storage in its own bonded warehouse.

Under this modification, if it can be called a modification, the nature of the transportation was likewise changed so as to follow the contract of shipment.

Gulf, Col. & Santa Fe R'way. Co. v. *Texas,* 204 U. S. 403;
Bracht & San Antonio & A. P. R. Co., 254 U. S. 489.

We respectfully submit that when the whiskey was entered in the Customs at Hoboken in the name of the consignee, McKesson & Robbins, Inc. and there physically delivered to and accepted by the consignee the foreign movement in commerce came to rest. The foreign shipment of freight was completed then and there.

Heyman v. *Southern R'way. Co.,* 203 U. S. 270;
Gulf, Col. & Santa Fe R'way. Co. v. *Texas,* 204 U. S. 403;
Kirmeyer v. *Kansas,* 236 U. S. 568;
Danziger et al. v. *Cooley,* 248 U. S. 319;
O'Kelley v. *U. S.,* 116 F. (2d) 966 (C. C. A. 8).

As was stated by this Court in *Danziger et al.* v. *Cooley, supra,* at page 327:

> "He (defendant in error), was at the point of destination and held the bill of lading, which carried with it control over the delivery. Conforming to his principal's instructions, he required that the purchase price be paid before the bill of lading was passed to the vendee. The money was paid under that requirement and he then turned over the bill of lading. A delivery of the shipment followed and that completed the transportation."

In

O'Kelley v. *U. S.*, 116 F. (2d) 966 (C. C. A. 8),

a prosecution under 18 U. S. C. A. 409, the Circuit Court of Appeals, in reversing the appellant's conviction, held that while the proof might have established larceny at common law, it did not establish the violation of the federal statute charged in the indictment since the evidence contradicted the allegation that the merchandise was part of an interstate shipment at the time it was stolen. In here ruling that the contract of interstate shipment had been performed and the transportation completed by the delivery of the merchandise to the consignee and its acceptance by him, the court stated at page 967:

> "It was the duty of the carrier to make delivery of the property entrusted to it and it was the duty of the consignee to accept that property. Both of these duties had been performed before the seventeen sacks of sugar were stolen. It must be borne in mind that this entire carload of goods was consigned to the Howe Wholesale Company, at Ravana, Arkansas, and when it accepted the car, broke the seal, removed part of its contents, and placed its private padlock on the door, the carrier no longer had possession but had surrendered dominion over the property to the consignee, and the consignee in turn had accepted and assumed full dominion and control over the property. This we think was a final and complete delivery. It was no longer a subject of interstate commerce. Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 27 S. Ct. 360, 51 L. Ed. 540, etc."

In that decision the Circuit Court for the Eighth Circuit reviewed its own earlier decision in

Marifian v. *U. S.*, 82 F. (2d) 628 (C. C. A. 8),

and distinguished between the two cases on their facts.

It should be noted that these cases as well as the later case of *Murphy* v. *U. S.*, 133 F. (2d) 622 (C. C. A. 6), dealt

with thefts of merchandise moving in interstate commerce in violation of Section 409, Title 18, U. S. C. A., and the Court in the *O'Kelley* case held that the *Marifian* case was clearly distinguishable because in the latter case

> "there was a direct taking of the property while it was being transported in interstate commerce."

In the *Murphy* case the stolen merchandise had never been delivered to and accepted by the consignee but was still in the carrier's possession at the time of the theft which was the reason for the finding that it was still moving in interstate commerce when the larceny was committed. The distinction between those facts and the record now sought to be reviewed is obvious.

The authorities above cited which give the rule for determining when a movement in interstate commerce comes to rest are, we submit, equally controlling on the question of the termination of movements in foreign commerce.

We further respectfully submit that the evidence on which this Petitioner was convicted establishes as matter of law that any theft of the 495 cases of whiskey on the afternoon of August 3, 1942 was not a theft of a shipment moving in foreign commerce, that the charges in the indictment were not sustained and that Title 18, Sect. 409, U. S. C. A., was not violated in the respect charged in the indictment.

The construction of Title 18, Sect. 409, United States Code was, of course, for the court. The determination as to whether the admitted facts constituted the violation of the statute charged in the indictment, was a matter exclusively within the province of the trial judge. The only issue presented on that score was one of law.

The denial of Petitioner's motion for a directed verdict was error. It "was in effect submitting to the jury to determine the meaning of the Act of Congress", within

the condemnation of the decision in *Northern Pac. Ry. Co.* v. *Finch, et al.*, 225 Fed. 676, 678.

In an analogous situation the Circuit Court of Appeals for the Eighth Circuit said, with respect to the language of a federal statute involving the meaning of the term "common carrier" (*Blumenthal, et al.* v. *U. S.*, 88 F. (2d) 522, 528):

> "It is a question of law for the court to determine what constitutes a common carrier, though it may be a question of fact, whether, under the evidence if it is disputed, a carrier comes within the definition of a common carrier and is carrying on its business in that capacity."

Here, of course, there was no dispute in the evidence as to whether the foreign transportation of freight had terminated at Pier 1, Hoboken. Whether this uncontradicted evidence established a violation of the statute was not a question of fact but exclusively one of law for the court to decide. The refusal of the court to make this decision was error.

As was said in

U. S. v. *DiGenova*, 134 F. (2d) 466, 468 (C. C. A. 3).

> "This refusal by the trial judge to assume his responsibility to declare the law applicable to the facts of the case was not merely an error which made possible a conviction where there was no evidence to support the charge but in addition was an abdication by the trial judge of his judicial function which this court may neither ignore nor condone."

The obligation of a trial judge to discharge the duties of his office is not a discretionary responsibility. It is imposed on him by the common law and is sanctioned and upheld in the Constitution of the United States.

As this Court has said in

Quercia v. *U. S.*, 289 U. S. 466, 469.

> "Under the Federal Constitution the essential prerogatives of the trial judge as they were secured by the rules of the common law are maintained in the Federal courts."

In

Kalos v. *U. S.*, 9 F. (2d) 268 (C. C. A. 8),

where the defendant had been convicted of violating a federal statute by receiving unlawfully imported morphine with knowledge of its unlawful origin, the evidence was uncontradicted that defendant did not speak or understand English, and, therefore, could not have known that the morphine had been imported illegally. In reversing the judgment of conviction the appellate court stated, at page 271:

> "The testimony that defendant could not speak nor understand English is uncontradicted. But the Court instructed the jury:
>
> 'Whether he understood or did not understand, whether it may have been explained to him at the time, I will leave for you gentlemen to determine from all the facts and circumstances in the testimony given in the case concerning that transaction.'
>
> We find no basis for the last sentence of that part of the charge. It permitted the jury to decide a fact contrary to the proof against defendant. It gave them liberty to indulge in suspicions, to hold the defendant to the conversation as his admissions and that he was there to receive the package because he knew it was intended for him and he had the right to take it."

So in the case at bar. The submission of the question as to whether the 495 cases of whiskey were, when stolen, still moving in foreign commerce, gave the jury liberty to indulge in caprice and speculation which had no support in the evidence.

It permitted them to find that if this Petitioner was guilty of common law larceny he was necessarily guilty

of the violation of the federal statute charged in the indictment.

We submit that it was obvious error and prejudicial to this Petitioner's right to a fair and impartial trial by due process of law as guaranteed to Petitioner by the Constitution.

POINT II

The judgment of conviction cannot be sustained on the theory that the variance between the indictment and the proof was immaterial.

In affirming the judgment of conviction the learned Circuit Court of Appeals did not pass on the point that the foreign movement in commerce had ceased at the time the 495 cases of whiskey were stolen. The indictment was based exclusively on a theft of this whiskey while moving as a part of a foreign shipment of freight from Leith, Scotland to New York, N. Y. Nevertheless, the decision of the Circuit Court states:

> "But we find it unnecessary to decide this disputed issue. If the whiskey, when stolen, was not moving in foreign commerce, it was clearly moving in interstate commerce; and the same statute covers either situation. The indictment completely described the facts which made up the charges against the defendants and the variance between the allegation that the whiskey was 'moving as a part of a foreign shipment of freight' and the proof that it was part of an interstate shipment could not possibly have surprised or misled the appellant."

The indictment charged only a theft from foreign commerce. The prosecution made no motion to conform the indictment to the proof. The case was submitted to the jury on the sole theory of a theft from foreign commerce and the jury was asked specifically to determine if the

theft was one of merchandise being transported in foreign commerce.

But wholly apart from these considerations, we urge error in this decision of the learned Circuit Court on the ground that the proof on the trial established as matter of law that the whiskey was not moving as part of either foreign or interstate commerce at the time it was stolen. It was not moving as a part of any foreign or interstate shipment of freight within the language or intendment of Title 18, Sect. 409, U. S. C. A. It was in bond, for the protection of the Customs duties lien of the United States and its character as bonded merchandise precludes its classification as a freight shipment or a shipment in commerce.

The truck from which this whiskey was stolen was a bonded truck and licensed as such in the U. S. Customs. It was under the exclusive control of McKesson & Robbins, Inc., which firm also owned and operated a Class 1 Bonded Warehouse of the United States Government.

The 495 cases of Scotch whiskey had been entered in Customs by McKesson & Robbins, Inc., at Pier 1, Hokoben and necessarily were in bond from then until such time as the customs duties were paid thereon. The only way they could be moved to a bonded warehouse from Pier 1, Hoboken, was in a bonded vehicle licensed by the U. S. Customs. While in such a vehicle they were as much in bond as if they were actually in the bonded warehouse.

This truck of McKesson & Robbins, Inc., owner of the whiskey and operator of the Government Bonded Warehouse at No. 111 Eighth Avenue, New York City, was merely a branch of said warehouse. It was the equivalent of an annex or adjunct thereof. Its contents were in bond under the control of McKesson & Robbins, Inc., as warehouseman and the United States Government.

How could the transfer of bonded merchandise from one bonded Government depository to another, or to one by means of the other, be part of a foreign or interstate shipment when it had already been received, paid for and entered in Customs by the consignee? How could such transfer of said merchandise in bond be construed as part of a "movement in commerce" at all, either foreign or interstate?

The term "commerce" as employed in federal and state statutes of a penal or regulatory nature connotes traffic, trade or intercourse for compensation or emolument. It implies a means to a financial, pecuniary or other like remunerative end.

> *Gibbons* v. *Ogden*, 22 U. S. (9 Wheat.) 1;
> *Welton* v. *Missouri*, 91 U. S. 275;
> *Keller* v. *United States*, 213 U. S. 138;
> *United States* v. *Hoke*, 187 Fed. 992.

It cannot be said that McKesson & Robbins, Inc., the owner of the whiskey, was trafficking or trading for financial gain in the whiskey when it was being moved to the bonded warehouse in New York. The storage of the whiskey in the warehouse would be for the protection of the Customs duty lien of the United States Government, not for the benefit or profit of the owner. Likewise, the transportation in bond to the warehouse after the documents of title had been delivered to McKesson & Robbins, Inc., at Pier 1, Hoboken, was for the protection of this Customs lien.

The commercial elements of the transaction were all eliminated after the whiskey and the freight charges had been paid for by McKesson & Robbins, Inc., and title thereto had passed to that consignee and the whiskey had been delivered into its care and control at the pier in Hoboken. True, the right to immediate unqualified

possession was subject to the lien of the United States for the unpaid Customs duties and to safeguard that lien the whiskey was kept in bond.

The Customs entry was made by McKesson & Robbins, Inc., as consignee (by assignment), at Pier 1, Hoboken and the whiskey was entered in Customs as the property of McKesson & Robbins, Inc., and for that company's account (pp. 14, 15).

As owner of the whiskey, McKessons & Robbins, Inc., necessarily was chargeable with the Customs trucking and storage charges while the whiskey remained in bond. It is immaterial that such charges were payable to McKesson & Robbins, Inc., in its capacity as proprietor of the Government Warehouse at No. 111 Eighth Avenue, New York City. The merchandise might just as well have been stored in any other bonded warehouse. Wherever it was stored McKesson & Robbins, Inc., as owner of the whiskey derived no profit from the transaction of having it moved and stored in bond.

No matter where this whiskey might be moved and stored while in bond after it had been entered in Customs by McKesson & Robbins, Inc., as its property, such movement and storage would not be a part of a foreign or interstate shipment of freight or part of a foreign or interstate movement in commerce.

The commerce had ended, the transportation in commerce had ceased once the consignee had the merchandise delivered, entered, bonded and warehoused in its own name. All rights of stoppage in transit would thereupon terminate.

Taney v. *Penn. Nat'l Bank,* 232 U. S. 174;
Mottram v. *Heyer,* 5 Denio (N. Y.) 629;
Holbrook v. *Vose,* 6 Bosw. (N. Y.) 76;
In Re Talbot & Poggi, 185 Fed. 986;
Cartwright v. *Wilmerding,* 24 N. Y. 521.

The status of merchandise reposing in a bonded depository licensed by the United States is thus stated by this Court in *Taney* v. *Penn. Nat'l Bank supra,* at page 184:

> "The building, (warehouse), is his, but the government is in complete control. The spirits are his, but he is subject to fine and imprisonment if he attempts to remove them. It is undoubtedly true that the government is not strictly a bailee. It assumes no responsibility to the distiller for the safety of the goods. (United States v. Witten, 143 U. S. 76, 78, 36 L. ed. 81, 82, 12 Sup. Ct. Rep. 372.) But the immunity which is incident to the exercise of governmental power in no way limits its effect upon the distiller's relation to the goods. They are effectually taken out of his power so that he is absolutely unable to make a physical delivery of them until the tax is paid."

While the warehouse receipts showing the storage of the merchandise in bonded depositories are negotiable and may be the subject of trade, the merchandise itself is not susceptible of sale and delivery until the Customs duties and taxes are paid and the lien thereof released.

Conceivably there could be a movement in commerce of these warehouse receipts. Conceivably they could, if sufficient in quantity, form a part of a shipment of freight, foreign or interstate, and thus come within the subject matter of Section 409, Title 18, U. S. C. A.

But here the merchandise itself was stolen, not the receipt showing its deposit in a bonded depository, and, we submit that bonded merchandise is not merchandise moving in commerce.

The proof here showed the exact status of the bonded whiskey at the time it was stolen. The indictment charged a theft of merchandise of an entirely different status, namely, merchandise moving as part of commerce. May

it properly be said that such a variance was not a fatal one?

This Court has consistently held that the allegations of an indictment and the proof as adduced at the trial should correspond so that the defendant may be fully informed of the precise nature of the charge against him and will not be misled in preparing and conducting his defense on the trial.

Berger v. *U. S.*, 295 U. S. 78.

The learned Circuit Court, in its decision affirming the judgment has said that the record here does not indicate that this Petitioner was misled by any allegation of the indictment or any alleged variance.

May we respectfully refer to the remarks of this Petitioner's trial counsel made during the Prosecution's summation which would indicate why the Petitioner did not take the stand or offer any evidence in contradiction to that of the Government. He there stated, "In view of the development in the case, it is really—we are not bound to present that testimony."

Had this Petitioner not believed that the Prosecution had failed to establish the specific allegations of the indictment, would he have rested on the Government's case?

POINT III

The trial court's instructions and remarks to the jury constituted an abuse of judicial discretion and materially prejudiced the Petitioner's right to a fair trial.

Due process of law, as guaranteed by the Fifth and Sixth Amendments to the United States Constitution, is not a mere abstract formula but rather a requirement that

every accused be granted a fair and impartial trial in accordance with our traditions of justice.

We respectfully submit that appellant's constitutional safeguards were ignored and the standard of justice which should prevail was violated by the court's argumentative discussion as to the inferences which the jury might draw from the fact that the accomplice, James Stegman, the Government's key witness, probably would be sentenced later by the same trial court.

Such discussion on its face would seem to have displayed the zeal of an advocate rather than the impartiality of a judge.

It was an argument as to a future event, not in evidence and, therefore, not properly cognizable by the jury. For that reason alone, if for no other, it constituted prejudicial error.

U. S. v. *Breitling,* 20 How. 252;
Mullen v. *U. S.,* 106 Fed. 892 (C. C. A. 6).

As was stated by this Court in *U. S.* v. *Breitling, supra,* at page 255:

> "It is clearly error in a court to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered. The instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the court; and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures, instead of weighing the testimony."

On equally cogent grounds, such statement constituted reversible error because of its obvious and manifest unfairness in inviting the jury to accept with favor the

motives and credibility of this Government witness, James Stegman.

When the trial court argued in its address to the jury:

> "Is he more likely to tell the truth or an untruth when he is testifying before the Judge who is going to sentence him? These are matters for you to consider. What is he to gain by telling the truth? What is he to gain by committing perjury in this case? Do you think it is going to help him if he commits perjury and he is going to be sentenced by this Court?"

in effect it told the jury that in all probability the witness had told the truth because he would have been afraid to lie before the trial judge.

What was James Stegman to gain? The answer may be found in the record of this trial, which shows that he obtained a suspended sentence for himself, although admittedly guilty of the crimes charged in the indictment and other like nefarious crimes.

If he committed perjury and the court was not apprized of it and such undetected perjury aided the Government's case, who could say that he would not have received the same consideration? Unless of course the court wanted to make the jury understand that the trial judge could not be deceived by any perjurer and that, therefore, the witness Stegman must have told the truth!

From any standpoint, we urge that this argumentative portion of the court's remarks was an abuse of judicial discretion and materially prejudiced the rights of this Petitioner on the trial.

Dwyer v. *U. S.*, 17 F. (2d) 696 (C. C. A. 2);
O'Shaughnessy v. *U. S.*, 17 F. (2d) 225 (C. C. A. 5);
Cline v. *U. S.*, 20 F. (2d) 494 (C. C. A. 8);
Minner v. *U. S.*, 57 F. (2d) 506 (C. C. A. 10);

Malaga v. *U. S.*, 57 F. (2d) 822 (C. C. A. 1);
Quercia v. *U. S.*, 289 U. S. 466.

As stated in *Malaga* v. *U. S.*, *supra*, at page 829:

> "Argumentative discussion on the effect of evidence as proof, or the inference to be drawn from the acts of witnesses, or of the respondent in a criminal case, are universally recognized as out of place from the bench."

Nor was the vice and unfairness of these argumentative comments cured by the trial court's added statement that the consideration of the matter was for the jury. The harm had been done and the nature of the instructions and comments was not basically remedied or corrected.

O'Shaughnessy v. *U. S.*, 17 F. (2d) 225 (C. C. A. 5);
Starr v. *U. S.*, 153 U. S. 614;
Quercia v. *U. S.*, 289 U. S. 466.

We quote from the decision of this Court in the case last cited:

> "In view of the fact that the jury is readily swayed by expressions of the court's opinion concerning the facts in any particular case, mere explanations that the opinion of the judge is not binding on the jury, under varying circumstances, have been held inadequate to counteract the influence of unwarranted statements from the bench."

Even though specific exceptions were not taken to these remarks, we ask this court in the exercise of its inherent constitutional powers to correct the results of such unjudicial statements, and to protect this Petitioner's rights. Precedent and authority therefor are not lacking.

Wiborg v. *U. S.*, 163 U. S. 632;
Crawford v. *U. S.*, 212 U. S. 183;
Williams v. *U. S.*, 66 F. (2d) 868 (C. C. A. 10).

CONCLUSION

We respectfully submit that this is a case eminently proper for this Honorable Court to review.

Dated: White Plains, New York, August 13, 1945.

Respectfully submitted,

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